In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 404

MAIR J. SCHEPPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was found guilty on two counts of an indictment which alleged violations of 26 U.S.C. 7206(1) in that he had wilfully made and subscribed corporate income tax returns for the House of Tobacco for the fiscal years ended August 31, 1958, and August 31, 1959, verified by written declarations that they were made under the penalties of perjury, which returns he did not believe to be true and correct as to every material matter in that the gross sales were understated by approximately one million dollars in each

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year (R. 340–342, 405, 528–529).[1] He was sentenced to one year's imprisonment on Count 4 and three year's probation on Count 5; he was also fined a total of $5,000 (R. 662–663).

House of Tobacco, a distributor dealing primarily in cigarettes and to a much lesser extent in cigars, gum and candy, sold to jobbers and wholesalers (R. 327). In broad outline, the government's proof showed that receipts from corporate sales which were not deposited in the bank were not reported on the federal income tax returns (R. 340, 415) and that the gross receipts undeposited and unreported totalled about $1,000,000 in each of the two years (R. 274, 340–342, 405).

The great bulk of the corporation's sales were of cigarettes fully tax-paid and acquired through a bonded warehouse (R. 282, 286, 288). Sometime prior to 1958, upon authorization by petitioner (R. 81–86, 181–187, 290–294, 277), the corporation began making "side sales" of cigarettes at a special discount to certain customers (R. 224–238). These sales were not recorded on the pre-printed corporate invoices but were recorded irregularly, sometimes on invoices of other companies or on scratch paper having no company name printed thereon (R. 225–226); some sales were without any written memorandum whatever, other than a notation in the margin of the invoice book of the total amount sold, which notation was later scratched out when payment was received (R. 227,

[1] Three other counts, charging petitioner and others with conspiracy and tax evasion, were dismissed on the prosecution's motion near the close of the evidence (R. 382).

402). No permanent record of these "scratch-out" sales was kept (R. 254–255, 280–281). Large amounts of cigarettes were purchased by the corporation from sources other than the bonded warehouse during the period in question and paid for in currency instead of by bank check (R. 245–251, 271). It became the corporation's custom to cash large amounts of checks each week and to retain the proceeds in currency in a cigar box kept on corporate premises for the purchase of cigarettes from the source other than the bonded warehouse (R. 191–195, 245–247, 298–320). Between $8,000 and $20,000 per week of corporate receipts were reduced to currency which was kept on the premises, mostly in the form of $100 bills (R. 246–249).

The corporation's accounting system required that all income be deposited to the bank account (R. 332, 337–338, 345). The accountant who prepared the returns did not perform an audit, but arrived at gross sales by eliminating from the total bank deposits all non-income items (R. 325, 332–335, 345–346). He had discussed this system with petitioner and Jack Rush, petitioner's associate in the business (R. 337, 344–345).

1. The district court did not, as petitioner urges (Pet. 5–12), err in excluding evidence that petitioner offered to prove there was no tax deficiency. This evidence was irrelevant and immaterial to any issue in the case. As the jury was instructed (R. 465, 468–469), there are three elements to a violation of Section 7206(1). These are (1) that the defendant made and subscribed the tax returns under the written

declaration that they were made under the penalties of perjury; (2) that when he signed the returns he did not believe them to be true as to every material matter; and (3) wilfulness. A tax deficiency, however, is not an element of the offense. *Siravo* v. *United States*, 377 F. 2d 469 (C.A. 1); *Hoover* v. *United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822; cf. *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917. To admit evidence such as that proferred here therefore would have allowed petitioner to defend against a crime with which he was not charged[2] (tax evasion, 26 U.S.C. 7201). And even if that evidence is thought to have some bearing on the question of wilfulness, it is at best remote, and would be likely to confuse the jury—a denouement that the trial court could properly prevent by excluding the evidence.

Petitioner cites no contrary authority, and we are aware of none. Indeed, a contention almost identical to that made here was recently rejected by the First Circuit in *Silverstein* v. *United States*, 377 F. 2d 269, 270–271. As the court there said: "the fact that the calculated tax may have been thought insubstantial, casts no light on the question whether the defendant innocently overlooked his gross receipts."

Lastly, the prosecutor made clear in his summation that petitioner was not being charged with at-

[2] The government had evidence of understatements of net income and tax liability, for petitioner had been indicted for wilfully attempting to evade corporate taxes (Pet. 3, fn. 1; R. 2, 526–528). This charge, as petitioner points out (Pet. 3, fn. 1), was dismissed by the government during the trial. See footnote 1, *supra*.

tempting to evade tax (R. 471). Defense counsel urged repeatedly that the gross receipts that were not reported were used for business purposes (R. 480–481, 482, 487) and that the government had not shown any motive for falsification of the returns (R. 492, 495, 499). There could not possibly have been any prejudice.

2. There is no substance to the argument (Pet. 12–20) that one witness—Hooks—at two points gave tesimony that the government knew to be false. The first piece of testimony under attack is Hooks' statement (R. 293–294) on direct examination that he had made some purchases from the corporation for which he received no invoices of any kind. The only indication that Hooks was lying was that in 1961 he had told Agent Henley (who investigated the instant case) that in his dealings with the corporation he had "always received a pre-numbered invoice" (R. 633). But even petitioner agrees that this 1961 statement was incorrect (Pet. 16–17); hence, even if the prosecutor had recalled it, he would have had no reason to believe that Hooks was lying on the witness stand and every reason to believe that Hooks was then telling the truth.[3] For example, Henley expressed the opinion in a 1967 affidavit (R. 661) "that Hooks received side

[3] Petitioner claims (Pet. 17) that the government knew, from the evidence in a previous trial, which ended in a hung jury, "that Hooks, like the other witnesses, received the scrap paper receipts when it purchased the so-called side sales (R. 637–642)." This is incorrect. The pages of the record referred to relate only to two invoices issued in the name of Lewis which may have represented sales to Hooks. (See text, *infra*.) Even if they did, there is no inconsistency between that fact and Hooks' testimony that he sometimes did not get invoices.

sales from the House of Tobacco without an invoice because Hooks received side sales over a period of time for which no record has been found either in his possession or in possession of the House of Tobacco."

The other part of Hooks testimony claimed to be false is his statement on cross-examination (R. 296) that he had never bought merchandise under an assumed name. Agent Henley had testified at a previous trial that an analysis of certain invoices had led him to the conclusion that two invoices in the name of Lewis had in fact been issued to Hooks (R. 626–629, 633–642). But those invoices were not conclusive. Hooks never told Henley that he had transacted business under the name of Lewis or any other assumed name (R. 661). The defense was fully aware of Henley's earlier testimony yet did not even mention the name of Lewis in cross-examining Hooks. Notably the defense did not call Agent Henley or petitioner's business associate, Rush, to impeach Hooks, even though both were present in the courtroom (R. 654) and Rush filed a post-trial affidavit stating that Hooks sometimes bought merchandise in the name of Lewis (R. 629–630).[4]

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[4] Rush's affidavit stated that on these occasions the invoices were made out to Lewis at the request of Hooks; that he (Rush) did not know whether Lewis really existed; but that Hooks was either "acting for Lewis or under the assumed name of Lewis." (R. 630). Rush's information was unavailable to the Government until after the trial.

The allegation (Pet. 17) that the government knew that a correlation could be made between "the non-invoice receipts to one 'Lewis' and the purchases of Hooks (R. 637–642)" is true only with respect to two invoices over the two-year period. Since Hooks was making about four purchases each week from

The theory that Hooks' testimony was false is dubious. The theory that the prosecutor knew it was false is wholly without support. The defense—no less than the prosecution—had full knowledge of and access to whatever evidence arguably impeached Hooks. At most there was available to the defense a contention that Hooks was lying—an issue of credibility of the sort that should have been submitted to the jury. The defense nevertheless did not raise the question until after trial. No precedent supports petitioner's present thesis—which amounts to a contention that the appellate courts should consider and decide whether Hooks was a credible witness.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the corporation the correlation of two Lewis invoices means little. Even if the Lewis invoices were issued to Hooks, the fact may be—as even Rush's affidavit (R. 630) admits—that Hooks was merely acting for a man named Lewis.

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